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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1295

DAVID H. WENGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner, David H. Wenger, by counsel, hereby petitions this Honorable Court, pursuant to Rule 58(2) of the Rules of this Court, for a rehearing on his petition for a writ of certiorari, which was denied on June 19, 1972, —— U. S. ——, 11 Cr. L. 4072.

Shortly after denial of certiorari herein, this Court delivered its opinion in *Barker* v. *Wingo*, 407 U. S. ——,

11 Cr. L. 3174 (No. 71-5255 6/22/72). It is respectfully submitted that the procedure and standards for determination of speedy trial claims set forth in *Barker* and this Court's subsequent vacation of the judgments, on June 26, 1972, in four other cases,* discussed *infra*, for reconsideration by the Second Circuit and the Kentucky Court of Appeals in the light of *Barker*, indicate that reconsideration of the petition herein is warranted and upon such reconsideration vacation of the judgment herein is also warranted for the same reasons that it was in the other cases.

In rejecting the demand-waiver rule as a threshhold requirement for the assertion of a violation of speedy trial rights, this Court, in *Barker*, held:

> "the rule we announce today, which comports with constitutional principles, places the primary burden on the courts and the prosecutors to assure that cases are brought to trial." 407 U. S. at ——, 11 Cr. L. at 3178.

The record in this case shows that the trial court was conscious of—and prepared to assume effectively—that burden in this case but was prevented from doing so by the deliberate two year prosecutorial delay in returning the indictment when the case against petitioner was admittedly complete. In language directly pertinent to the present case *Barker* holds:

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* *Saglimbene* v. *United States*, —— U. S. ——, 11 Cr. L. 4083 (No. 71-847 6/26/72); *Campopiano* v. *United States*, —— U. S. ——, 11 Cr. L. 4083 (71-1028 6/26/72); *Fasnaro* v. *United States*, —— U. S. ——, 11 Cr. L. 4083 (71-6337 6/26/72); *Kelley* v. *Kentucky*, —— U. S. ——, 11 Cr. L. 4083 (71-6196 6/26/72).

> "A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government." 407 U. S. at ——, 11 Cr. L. at 3179.

Because "[t]he Second Circuit's approach is unclear", *Barker* v. *Wingo*, 407 U. S. at —— n. 23, 11 Cr. L. 3177 n. 23, petitioner's claim that he was denied a speedy trial has not received consideration by the Courts below under the standards which *Barker* holds should be applied. Where such consideration has not been given, this Court's orders of June 26, 1972 in the cases cited *supra*, indicate that vacation of the judgment to allow reconsideration is appropriate. It is respectfully submitted that an analysis of those cases shows that a similar result should follow in this case.

In *Saglimbene* v. *United States*, —— U. S. —— (No. 71-847), complaint was made that the government had delayed the trial to gain a tactical advantage over the accused by trying the co-defendant (a fugitive) first. The Second Circuit affirmed the narcotics conviction without opinion (*Saglimbene* petition, App. A).

In *Campopiano* v. *United States*, —— U. S. —— (No. 71-1028), as in this case, the delay complained of was the two years preceding indictment. In a *per curiam* opinion, the Second Circuit summarily dismissed the speedy trial point (*Campopiano* petition, App. A) just as it did in this case (455 F. 2d at 310-11).

In *Fasnaro* v. *United States*, —— U. S. —— (No. 71-6337), as in the present case, the petitioner had been indicted in the Southern as well as the Eastern Districts of New York (*Fasnaro* petition, p. 10) and the government elected to try him in one district and put off trial

in the other district. Apparently the Second Circuit affirmed the delayed hijacking conviction without opinion (*Fasnaro* petition, p. 1).

In *Kelley* v. *Commonwealth of Kentucky*, —— U. S. —— (No. 71-6196), the Kentucky Court of Appeals summarily denied the speedy trial claim on a mechanical application of the demand-waiver rule (474 S. W. 2d at 64) just as the Second Circuit in this case held,—erroneously,—that petitioner had no complaint as long as the indictment was returned within the period prescribed by the statute of limitations (455 F. 2d at 311).*

Petitioner here also has not received consideration of his claim of denial of a speedy trial and due process under appropriate standards. In the first instance, the prosecution itself, by misrepresenting the delay issue before the indicting grand jury prevented the grand jury from determining the effect of the delay (petitioner's reply, pp. 9-10).** When these issues were raised before the trial court, that court felt bound to deny relief on the basis of the then precedents in the Second Circuit

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* Citing *United States* v. *Marion*, 404 U. S. 307 (1971). What this Court actually said in *Marion* was: "Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment, if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was a purposeful device to gain tactical advantage over the accused." 404 U. S. at 324, 92 S. Ct. at 465.

** Since certiorari was denied herein on June 19, 1972, this Court may not have had sufficient time to consider petitioner's reply which was filed on June 13, 1972. As the reply supplements the petition and refutes the brief in opposition, reconsideration of the reply is respectfully suggested on rehearing.

found "unclear" by this Court in *Barker* and which *Barker* rejects to the extent they constitute a rigid application of the demand-waiver rule or any of the other four factors to be weighed. 407 U. S. at ——; 11 Cr. L. at 3177, 3179-80.* As already noted, the Second Circuit rejected the claim without discussion of any of the factors concerning the admitted two year prosecutorial delay during a crucial period but relied on the fact that the indictment was returned (just) within the statute of limitations.** 455 F. 2d at 311.

The only speedy trial case, other than those just discussed, decided by this Court after *Barker, Stein* v. *United States,* certiorari to the Second Circuit denied, June 26, 1972, —— U. S. ——, 11 Cr. L. 4076 (No. 71-1214), would also seem to indicate that vacation of the judgment herein to permit reconsideration of the issue is appropriate. In *Stein* a substantial issue of delay and attendant prejudice was raised. However, the Second Circuit panel in *Stein* carefully analyzed the factors involved (in an opinion covering 11 closely printed pages of the petition, *Stein* petition, App. A, pp. 14-24) according to standards not appreciably different from those later enunciated in

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* On denial of the motion to dismiss the indictment, without opinion, the trial judge stated, "there is nothing I can really add to the Second Circuit opinions that is going to be of any help to them . . ." (A. 668).

** Reliance on the statute of limitations alone is not a determination of a speedy trial claim. If an indictment is returned beyond the period limited, the prosecution is barred without regard to any of the factors which this Court held in *Marion* and *Barker* should be considered where the delay in prosecution is not specifically dealt with by statute or rule.

*Barker** and in terms quite distinguishable from the present case (e.g.s.: in *Stein,* the delay was not purposeful (456 F. 2d at 848), here it was admittedly so; in *Stein* there had been a rapid increase in case load per judge in the Southern District of New York (Ibid.), whereas below the trial court stated that, had the indictment against petitioner been returned in 1968 when the completed case was first presented to a grand jury, a trial would have been had in 1968 (A. 370-1)). Thus in *Stein,* where the claim was sensitively evaluated according to standards which this Court has announced, the petition was denied. In *Saglimbene, Campopiano, Kelley* and *Fasanaro,* where the claim of delay was not evaluated or treated under unstated or incorrect standards, the judgments were vacated to permit reconsideration by the lower courts under the *Barker* standards. As petitioner's case would fall in the latter group of cases but for the accident of time of decision it is respectfully submitted that the situation be rectified through a similar result in this case on this petition for rehearing.

Of particular pertinence is the intervening *Campopiano* decision for there, as here, the delay complained of was the two years preceding indictment. There, as in this case, the Solicitor's brief in opposition argued that *Marion* foreclosed any claim of a speedy trial violation (*Campopiano* brief in opposition, pp. 4-5; brief in opposition herein, p. 5). The court below made the same interpretation of *Marion* in this case. 455 F. 2d at 311. The vacation of the judgment in *Campopiano* as well as the careful discussion of the standards to be applied in *Barker* show this holding to be erroneous.

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* E.g.: the right to a speedy trial is relative (*Barker,* 407 U. S. at ——, 11 Cr. L. at 3176; *United States* v. *Stein,* 456 F. 2d at 847) and the four factor analysis (*Barker,* 407 U. S. at ——, 11 Cr. L. at 3179; *Stein,* 456 F. 2d at 847-8).

Since the deliberate prosecutorial delay is conceded, the two year delay was for the purpose of returning and trying other later cases to petitioner's disadvantage (See *Saglimbene, supra*), petitioner could have made no demand since the dual grand jury presentation was concealed from him until inadvertently revealed during the trial itself, and there was not insubstantial prejudice to his case (petition, pp. 4-6), if there is such showing required where the delay was prosecution motivated as here, this case meets the tests of *Barker* 407 U. S. at ——, 11 Cr. L. at 3179. Unless the judgment below is vacated and the case remanded for reconsideration under *Barker,* petitioner will be foreclosed from having his substantial claim of deliberate violation of Fifth and Sixth Amendment rights, which he has assiduously asserted once he discovered the violation, considered by *any* court under appropriate standards.

CONCLUSION

For the foregoing reasons and those previously advanced, it is respectfully submitted that rehearing be granted and upon such grant, the original petition be granted and the judgment below vacated.

Respectfully submitted,

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Certificate of Counsel

I, attorney for petitioner, hereby certify that this petition for rehearing is presented in good faith, on the grounds stated herein, pursuant to Rule 58(2) of the Rules of this Court, and not for delay.

/s/ LLOYD A. HALE,
Attorney for Petitioner.